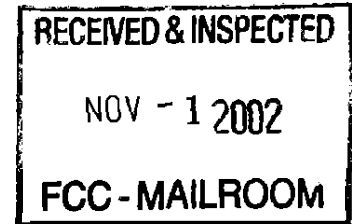


Before the  
Federal Communications Commission  
Washington, D.C. 20554

FCC 02M-99

In the Matter of )  
 )  
FAMILY BROADCASTING, INC. )  
 )  
Order to Show Cause Why the Licenses for )  
Stations WSTX(AM) and WSTX-FM, )  
Christiansted, U.S. Virgin Islands, )  
Should Not Be Revoked )

EB Docket No. 01-39



**MEMORANDUM OPINION AND ORDER**

**Issued:** October 25, 2002

**Released:** November 1, 2002

**PRELIMINARY STATEMENT**

1. This is a ruling on Enforcement Bureau's Motion to Enlarge Issues filed on May 8, 2002. An Opposition was filed by Family Broadcasting, Inc. ("Family") on June 3, 2002. Enforcement Bureau's ("Bureau") Reply to Opposition was filed on October 11, 2002.<sup>1</sup>

2. The Bureau seeks issues:

To determine the current ownership of Family Broadcasting, Inc.; and

To determine, based on the evidence adduced, whether Family Broadcasting, Inc.'s most recent ownership report and amendments to applications for transfer of control certifications regarding its current and proposed ownership misrepresent facts and/or lack candor.

<sup>1</sup> There was a hiatus in this case from May 23, 2002 (Order FCC 02M-39) to October 4, 2002 (Order FCC 02M-94) on a question of disqualification of Presiding Judge. Memorandum Opinion and Order FCC 02M-39, released May 23, 2002. The Commission affirmed the Presiding Judge's qualification to continue presiding in this case. See Memorandum Opinion and Order FCC 02-275, released October 2, 2002. The case was returned to adjudication on October 4, 2002, and the Bureau was instructed to file a Reply pleading by October 11, 2002 (Order FCC 02M-94). The Bureau's Motion to Enlarge Issues is now ripe for a ruling.

### Facts

3. There already is an issue in this case concerning the transfer of control of Family from Mr. Luz James and Mrs. Asta James to their four children. In the context of deciding that issue, there must be a determination made as to the present ownership of Family. Family has the burden of proof and Family will be offering proof at the hearing set for February 25, 2003. Order FCC 02M-98, released October 21, 2002. Clearly, it is in the best interest of the transfer parties that all decisionally significant information on ownership be provided to the Commission. To obtain further information, the Bureau will be taking deposition discovery on the question of ownership in November and December, 2000. Id.

4. From a review of the pleadings and documents, it appears that the intended transferees have provided a written version of an initially oral transfer agreement between parents (transferors) and children (transferees). The Bureau appears satisfied that it now has reliable proof of **an** agreement. But ascertainment of stock ownership remains a factual concern. Since all the stock cannot be accounted for, there is concern over a possible lingering attributable interest. As once reported by Family, "the transferees do not know the identity of the persons holding the remaining 7% ' of the Family Broadcasting, Inc. stock. Mrs. James-Petersen, daughter of Luz and Asta James, testified at an earlier deposition that she could find no stock certificates, register or ledger. However, it is her belief that none of the unknown stockholders own or control attributable stock positions, and none are officers or directors of Family.

5. After review of the pleadings, the current state of the evidence on ownership is still not conclusive. Therefore, ownership of Family has not yet been established. As far as the Bureau can presently ascertain, there are 2, 771 shares of family voting stock outstanding, 51 % of which are owned by Luz James and 42% of which are owned by his wife, Asta James. The remaining 7% is owned by 42 "various other persons."<sup>2</sup> Also, there appear to be inconsistent reportings in 1995 reflecting that Luz James owns 60% with his wife owning 25% and his daughter Mrs. James-Petersen owning 15%, thereby accounting for 100% of Family stock. In that regard, Mrs. James-Petersen testified in an earlier deposition that she did not know whether or not the 1995 Ownership Report tiled with the Commission was accurate. She denied ever having a 15% ownership interest in Family stock. However, no Ownership Reports were filed between 1995 and 2001.

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<sup>2</sup> This information is set forth in the Bureau's Motion to Enlarge Issues at Para 4. fn 4 which cites attached copies of Ownership Report filed in 2000, the Transfer of Control Application, and a letter dated May 3, 2002, from Family's counsel to Bureau counsel.

6. The Bureau argues that based on the information it presently has, it cannot determine that there is no person (other than Luz and Asta James) holding 5 % or more of Family stock. It also could not be ascertained due to an absence of corporate records (stock certificates, transfer records, stock ledger) that Luz and Asta own 93 %. In its Opposition, Family represents that “a set of records have now been located which vindicate Mrs. James-Petersen’s belief.” These are identified as handwritten records which disclose the names of 42 “outsiders” who have been sold Family stock by Mr. Luz James. A significant number of the shares of “outsider” stock apparently were recently retired. If that is the case, Luz and Asta James may now control 98% of the Family stock.

### Discussion

7. Memorandum Opinion And Order and Hearing Designation Order. FCC 02-91, released March 28, 2002 at 12, Para. 34, authorizes Bureau counsel to request added issues after summary decision, but only where appropriate. The Commission’s standard for adding post-designation issues requires a determination that there is a question of probable decisional significance and substantial public interest raised by allegations based on official notice evidence or affidavits of persons with personal knowledge. 47 C.F.R. §1.229(d). The Bureau relies on the Commission’s authorization in the designation order to ask for these late issues, citing filings of Family with the Commission that qualify for official notice, and sworn deposition testimony of Mrs. James-Petersen, a former general manager of the Family stations. The Bureau has met the technical conditions of §1.299.

8. The parties to the intended transfer do not know the identity of persons holding 7% of Family’s voting stock. But the mere lack of knowledge, even of facts that should be known, does not amount to misrepresentation or lack of candor where there is no theory of motive advanced. See Scott & Davis Enterprises, Inc., 88 FCC 2d 1090, 1099 (Review Bd. 1082) (improper motive must be shown). To the contrary, it would seem to be more in the interest of the parties to a prospective transfer to fully and immediately disclose ownership of the assignor-licensee so that the transaction can move forward without any residue questions of attributable interests. In other words, a credible motive to misrepresent would be more likely expected where the parties unequivocally lie as to definitive ownership rather than obfuscate. If Family is misrepresenting, it is doing so in a manner that slows the transfer process and could jeopardize a transfer while incurring considerable legal costs. It is also found that there are no allegations of significant fact sufficient to raise a serious question of an intent to deceive the Commission. See Riverside Broadcasting Co., Inc., FCC 86-236, released May 14, 1986 (intent to deceive is sine quae non for a misrepresentation issue to be added).

9. This is not to say that the Bureau should no longer pursue the facts of stock ownership. There is still much work to be done on the question without burdening the record with another issue. Evidence seems to be forthcoming in bits and pieces and it is the task of the parties and counsel to marshal and present all relevant facts. But there is

not a sufficient legal foundation for suspecting or suggesting in an added issue that there has been a misrepresentation as to ownership with an intent to deceive. The problem with Family ownership reports and accounting for stockholders begins with failures over several years by the founder of Family Broadcasting, Inc., Mr. Luz James, to keep accurate and up to date records. His daughter, Mrs. James-Petersen, succeeded to that state of neglected record-keeping when she became general manager. She was not present at the creation of Family's deficient record making and record keeping. Therefore, without substantial evidence showing more than negligence, her degree of knowledge about ownership and fraudulent intent cannot be inferred.<sup>3</sup>

### Conclusion

10. Whether or not the requested issues are added, the decisionally significant question of licensee ownership remains with the case through decision making. Family has the burden of proving ownership by a preponderance of the evidence so the first requested issue is already set. Therefore, the first added issue sought by the Bureau is not necessary to the disposition of this case. However, the denial of added issues does not effect the Bureau's discovery that is now underway.

11. In the Commission's denial of summary decision, it set issues as to whether Luz and Asta James would continue to influence or control Family even after the transfer to their children. See Memorandum Opinion and Order and Hearing Designation Order, FCC 02-91, released March 28, 2002, at 12 – 13, Paras. 34(a) and 34(f).<sup>4</sup> Therefore, the question of control being retained by the assigning parents will be adjudicated after a full hearing on-the-record even though the Bureau's requested issues are not added.

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<sup>7</sup> However, the parties and counsel are on notice that adverse findings on credibility and candor can be made based on testimony presented before the Presiding Judge without the adding of an issue. See e.g. Maria M. Ochoa, 7 FCC Rcd 6569 (Review Bd. 1992), aff'd Maria M. Ochoa, 8 FCC Rcd 3135, 3137 (1993), rehearing denied Maria M. Ochoa, 10 FCC Rcd 142, aff'd Marie M. Ochoa v. FCC, 98 F3d 646 (D.C. Cir 1996). See also Old Time Religion Hour, Inc., 95 FCC 2d 713,719 (Review Bd. 1983) ("false statements in the course of the hearing process are, in and of themselves, of substantial significance, ---- and that such false testimony may lead to disqualification").

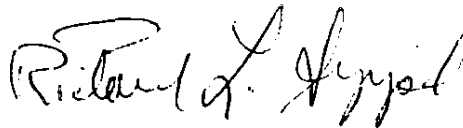
<sup>4</sup> The Memorandum Opinion and Order and Hearing Designation Order, supra, sets a misrepresentation issue: "To determine whether transferee Barbara James-Petersen, in her capacity as general manager from July 1998 until march 2001, misrepresented facts and or lacked candor with the Commission concerning the operation of WSTX (AM) and WSTX-FM." Id. at 12, Para. 34(c).

12. Finally, the circumstances of Family's ownership evidence otherwise fail to qualify for an added misrepresentation/lack of candor issue. A request for adding a disqualifying misrepresentation/lack of candor issue because Mrs. James-Petersen could not account for 7% of ownership is not justified since it was Luz James who had **set up** the corporation, solicited purchasers, and "issued" the Family stock. Nor is there evidence of Mrs. James-Petersen's involvement in connection with the issuance of the shares of Family stock or other evidence showing that she was familiar with the "outsider" shareholders at the time of issuance. While the Bureau demonstrates what Mrs. James-Petersen does not know, there is not sufficient evidence proffered of what she actually knew or actually knows of stock ownership that would support an added misrepresentation/lack of candor issue. The failures to accurately report could be attributable to negligence given the way that Family's record keeping was maintained. Therefore, the misrepresentation/lack of candor issue will be denied in accord with the Commission's policy that issues on misrepresentation or lack of candor not be added on speculative allegations. See Folkways Broadcasting Co., Inc., 33 FCC 2d 806, 811 (Review Bd. 1972).

### RULING

Accordingly, IT IS ORDERED that the Enforcement Bureau's Motion to Enlarge Issues filed on May 8, 2002, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION<sup>5</sup>



Richard L. Sippel  
Chief Administrative Law Judge

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<sup>5</sup> Courtesy copies of this Order were e-mailed or faxed to counsel on date of issuance.